United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1384

United States Court of Appeals
for the Second Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appelle

v.

REV. ALBERTO MEJIAS, MANUEL FRANCISCO PADILLA MARTINEZ, HENRY CIFUENTES-ROJAS, JOSE RAMINEREZ-RIVERA, ESTALLA NAVAS and MARIO NAVAS,

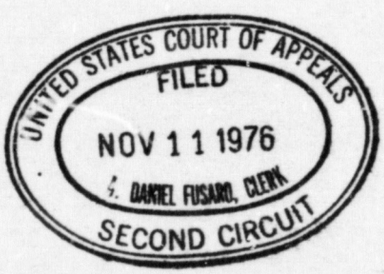
Defendants-Appellants.

Docket No. 76-1384

B
P/S

BRIEF ON BEHALF OF DEFENDANT APPELLANT

HENRY CIFUENTES-ROJAS



STUART R. SHAW
ATTORNEY AT LAW
600 MADISON AVENUE
NEW YORK, N. Y. 10022

(212) 755-5645

TABLE OF CONTENTS

United States Court of Appeals
for the Second Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee

Docket No. 76-1384

v.

REV. ALBERTO MEJIAS, MANUEL FRANCISCO PADILLA MARTINEZ, HENRY CIFUENTES-ROJAS, JOSE RAMINEREZ-RIVERA, ESTELLA NAVAS and MARIO NAVAS,

Defendants-Appellants.

BRIEF ON BEHALF OF DEFENDANT APPELLANT

HENRY CIFUENTES-ROJAS

TABLE OF CASES

Constitutional Provisions: Amendment IV, United States Constitution

INTRODUCTORY STATEMENT

Henry Cifuentes Rojas appeals from a judgement of conviction entered on July 30, 1976 in the United States District Court for the Southern District of New York after a six and one-half week trial before the Honorable Robert L. Carter, United States District Judge, and a jury.

Indictment 76 Cr 164 charged defendant Rojas with conspiracy to violate Sections 812, 841(a)(1), 841(b)(1)(A), 952(a), 955, 959, 960(a) and 960(b)(1) of Title 21, United States Code (Count One) and with distribution and possession with intent to distribute a Schedule II narcotic drug in violation of Title 21, United States Code, Sections 812, 841 (a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2 (Count Five).

Defendants trial commenced on May 25, 1976 and concluded on June 30, 1976 when the jury found defendant Rojas guilty on both counts.

On July 30, 1976, Judge Carter sentenced Rojas to 15 years imprisonment on Count ONE to be served concurrently with 15 years imprisonment imposed on the conviction for COUNT FIVE.

STATEMENT OF FACTS

a. The Prosecution's Case

On September 3, 1974 at approximately 3:45pm (TT2133) Agent Robert Palumbo of the Drug Enforcement Administration (DEA) (TT2127) pursuant to a radio communication, drove in an undercover DEA taxi cab (TT2153) down 30th Street toward 8th Avenue in New York City, exited the vehicle, approached a green Volkswagon that had stopped for a light (TT2161) and told the person inside the Volkswagon that he was under arrest (TT2162), not knowing the person or his name at the time (TT2133). The person in the Volkswagon did nothing suspicious (TT2162). Palumbo later identified said person by a photo as the defendant Rojas, because he had never seen him before the arrest (TT2159).

Palumbo did not have an arrest warrant when he arrested the defendant Rojas (TT2146 1 6-9). Agent Palumbo had worked for the DEA and other government agencies specializing in narcotics for over 6 years (TT2145), and had taken courses from a lawyer in the law of search and seizure and had been taught about warrants (TT 2145 & TT2146). Palumbo did not know who was at the 30th Street location (TT2156). Palumbo did not ask to see Rojas' license or registration when he arrested the defendant (TT2160) nor did he advise the defendant of his rights in English or Spanish (TT2160). Palumbo never saw Rojas in Apartment 6A at 327 West 30th Street, New York, New York (TT2160).

Palumbo stated he "didn't have the slightest idea" why Rojas was arrested (TT2162).

Police Office William Mulligan of the N.Y.C.P.D. testified that he has been employed by same for more than 10 years (TT2208). That he was on duty on September 3, 1974 and at approximately 3:40pm saw a male exit apartment 6A from a peephole in apartment 6B (TT2208) and that he "felt" that the male was Rojas. That he entered apartment 6B without permission and/or a key (TT2578) and had had apartment 6A under surveillance through a peephole since 7:30am (TT2578), but had observed Rojas through the peephole for only "3 to 5 seconds" (TT2589). That one Pedro Bello was seen leaving apartment 6A with a package that was later found with a scale in it (TT2588). That in the State Court in June 1975 (State Suppressing Hearing Transcript at p495)(TT2589&2590) Mulligan identifies co defendants Alizar and Padilla as having been present with Rojas in apartment 6A at 327 West 30th Street, New York, New York which was clearly opposite to the testimony of all other prosecution witnesses at the hearing in Federal Court. That Mulligan thought one individual walked out of apartment 6A before Rojas and that he "thought" it was a male, not carrying anything (TT2295). That Mulligan couldn't recall if Mulligan or Officer Finley identified the man who left the apartment (TT2596). That Mulligan could only see the individual from the shoulders up through the peephole of apartment 6B (TT2597). That Mulligan didn't recall seeing

Rojas in apartment 6A or 6B on September 3, 1974. That Mulligan saw a female in apartment 6A or 6B on September 3, 1974 but she was not the one he saw earlier and she was released (TT2593).

Officer William Mulligan of the N.Y.C.P.D. testified he had been employed by same for approximately 12 years (TT2214). That he was present when apartment 6A "was opened" (TT2215) (broken into without a warrant) and "conducted a search of the apartment" (TT2215) along with a Detective Caracappa and a Sargent Troglio. That he and the other officer seized marijuana, miscellaneous papers, (TT2216) two pairs of black shoes with residue of white powder in a brown bag, a brown bag with plastic bags containg white powder in a closet (TT2216) and a brown paper bag containing U.S. Currencies in the bottom shelf of a night table in the bedroom (TT2215). That he took the money and other items from a Jose Lopez and noted that on an evidence voucher (TT2217). That a search warrant to search the apartment did not arrive until 11pm (TT2232), that after the search warrant arrived he "didn't seize any additional property" (TT2234).

MICHAEL CUNNIFF, an employee of the DEA for at least four years testified that on September 3, 1974 he participated in the arrest of three of Rojas co-defendants in Queens (TT2051) but that the information in regard to the arrest was never communicated to the New York headquarters of DEA, or the APA Larry Hermann, etc. (TT2087, 2088 and 2089).

Detective VINCENT PALAZOTTO of New York City Police Department testified that he entered apartment 1B at 445 West 48th Street, New York, New York on September 3, 1949 at approximately 5pm, (TT2895, 2897, 2898), without a warrant. That Police Officer Luis Ramos brought a warrant to the apartment on West 48th Street (TT2909) at approximately 10:30pm (TT2908).

HARRISON of the New York City Police Department, a crime lab chemist testified and defense counsel stipulated to the chemists report which indicated that either cocaine or marijuana were present (TT2892).

WILLIAM F. MANNING testified he searched apartment 6A at 327 West 30th Street on September 3, 1974 at approximately 4pm (TT2331). That he looked in the closets before looking in the bathroom (TT2313, 2315, 2316) during what he termed a "security search" that took 10 minutes (TT2332). That Manning did not have his gun drawn during the "security search" (TT2379). That Manning saw Rojas in apartment 6B at the same address on the same date after he searched 6A (TT2333) and that he did not see Rojas advised of his rights (TT2334). Manning testified that Sargents Triglio and Geberth forcibly entered apartment 6A through the windows (TT2338) while he entered through the door. That Manning saw an unidentified man with $2,300.00 on his person in custody in apartment 6A who was later released. That he heard a communication that "Mr. Rojas was leaving" apartment 6A at approximately 4pm (TT2382) which is contrary to either

testimony by Agents that they had never seen Rojas before. That Manning could not hear what was going on in apartment 6A from apartment 6B at 327 West 30th Street, New York, New York, even when the doors to 30th Street apartment were open (TT2359). Manning testified the search warrant for apartment 6A arrived at 11pm (TT2361). That an unidentified woman whose name and address are unknown was released after being arrested in apartment 6A (TT2361-2364). That Manning was assigned to arrest Rojas for violation of the New York State Narcotic Laws under the Penal Law (TT2368-2369). Manning testified that he "would swear to what transpired even though you (he sic) didn't see it." (TT2383).

Ramos testified that he looked through the peephole, could only see from the waist up. Apartment 6A was directly across from apartment 6B at 327 West 30th Street (TT2194,2195)

Officer STEVEN CARACAPPA of the New York City Police Department testified that he was at 327 West 30th Street, New York, New York, apartment 6A sometime after 4pm on that date (TT2447). That he seized items of evidence including cocaine and marijuana and papers at said address including exhibits 526, 507, 504-A, 540, 540-A, 532, 539, 536, 537, 534, and 530 (TT2450-2459). That he put the Appellant Rojas' name on an envelope that was entered into evidence on 9/4/74 (TT2459). That Rojas was not in apartment 6A when he entered it on 9/3/74 (TT2474). That a female was released from apartment 6A on that

date (TT2474).

Agent ADAM MANGINO of the DEA testified that he worked for same for four years (TT3419). That he was at 327 West 30th Street on September 3, 1974 and that he seized items of evidence then but didn't know if he seized them from apartment 6A or from apartment 6B (TT3423).

b. The Defendant's Case

Appellant ROJAS testified at a hearing concerning brutality under his true name JUAN JOSE PLATA. On cross-examination by Assistant United States Attorney MICHAEL CAREY he testified that he was arrested at approximately 2:45 on September 3, 1974 and taken to apartment 6B at 327 West 30th Street, was handcuffed by eight or nine agents (TT2689) and that his head was placed inside an oven and beaten, along with one Jose Bello. That he was taken after this to apartment 6A by the authorities. (TT2703).

RALPH ALBANIZIO (SIC ADDONIZIO), a private investigator for defendant ROJAS (TT3472). He testified that he went to apartments 6A and 6B at 327 West 30th Street with a photographer (TT3473). That he had the photographer take photographs that showed how the door to 6A had been forced in because the frame was still dented (TT3470). That there were shallow closets, 3 feet deep (TT3477) in the apartment 6A, with shelves (TT3480).

That ADDONIZIO looked from a peephole from 6A to 6B and had the photographer take photos of said view (TT3481) Exhibits D, E and F. (TT3473, 3480, & 3481), photos of said apartment and the view were placed into evidence for the defendant Rojas (PLATA).

That ADDONIZIO looked through the peephole and had a photographer take photographs or the entire area he could see

through the peephole, from all angles, and that area was approximately a three foot oval (TT3527-3531 & 3536) and counsel for appellant again and again attempted to offer testimony of the hearing in State Court which was denied (TT3540). However, the Government stipulated they did not know the name or whereabouts of the woman arrested and released in apartment 6A at 327 West 30th Street on September 3, 1974 (TT3540).

POINT I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY NOT RECOGNIZING THE TIMELY AND PROPER MOTION ON BEHALF OF APPELLANT ROJAS TO SUPPRESS ALL EVIDENCE ILLEGALY SEIZED FROM THE 30TH STREET APARTMENT, AND NOT GRANTING A HEARING TO SUPPRESS SAID EVIDENCE.

A. PRELIMINARY DISCUSSION

Motions on the issue of search and seizure of evidence in the instant case arose from searches at both the 327 West 30th Street, Apartment 6A and 445 West 48th Street, Apartment 1B apartments on September 3rd, 1974. The same team of investigators working on project Banshee searched both apartments. There was one affidavit for both of the aforementioned apartments. The affidavit for both warrants was by the same Assistant District Attorney, Larry Hermann. The warrants were signed by the same New York State Supreme Court Justice Leonard Sandler. Each warrant was executed almost simultaneously by the same law enforcement personnel, Dective Luis Ramos. (AFTER the apartments were searched).

On April 1st, 1976 (more than 6 weeks prior to the trial below) Counsel for Appellant, Henry Cifuentes-Rojas, duly made and filed a motion to suppress all evidence seized at apartment 6A at 327 West 30th Street, New York, relying on the theory that the Government violated Appellant's rights under the Fourth Amendment of the United States Constitution.

A request for a pre-trial evidentiary hearing accompanied the motion. The motion was denied by Hon. Judge Robert L. Carter on April 7, 1976, without an opinion. Judge Carter on March 30, at a pre-trial hearing ordered all defense counsel to have all motions in by April 1st and ordered the prosecutor Michael Carey to reply by April 7th. Defense Counsel for Rojas complied with the judges order.

The record at the suppression hearing that began May 17, 1976 is unclear on why tne motion to suppress on behalf of Appellant Rojas was denied. It could be inferred from the minutes that the trial judge ruled lack of standing and/or that the motion was untimely. The trial judge was never specific in this regard despite the fact that counsel for Rojas requested specificity in said regard.

On May 17, 1976, each co defendant at trial, (Appellants Mejia, Pedilla, Valezuela and Salazar) who made a motion to suppress evidence seized at the 445 West 48th Street apartment, (that had been ordered suppressed by Justice Coon (PEOPLE vs SALAZAR, 83 M 2d 922, 373 NYS 2d 295 (New York Co., 1975) after a New York State Supreme Court, three and a half weeks long suppression hearing) were granted the rights to conduct an evidentiary hearin on their suppression motions. Justice Coon had ruled on Rojas at said hearing and the 30th Street apartment as well. It should be noted that co counsel for Mejia, Mr. Ciampa, made a motion to suppress and that the District Court ruled at the March 30th hearing upon motion of Ramirez' attorney, Mr. Solomon, that all rights made under one motion

would inure to all co appellants. Mr. Ciampa's brief quoted extensively from Justice Coon's opinion which clearly outlined the facts and his decision on Rojas and the 30th Street apartment.

Counsel for appellant, Rojas, made repeated attempts to discover why his motion to suppress was denied without a hearing. Although the record is not perfectly clear, it appears that the motion was denied on either the gound of timeliness and/or standing. Both grounds are discussed at length herein, and it is respectfully submitted that the trial judge committed error by denying the motion on either or both grounds.

B. THE MOTION ON BEHALF OF DEFENDANT ROJAS WAS TIMELY

The record of the suppression hearing reveals that one of the grounds that the trial Judge denied defendant Rojas' motion on the ground it was not timely:

THE COURT: All right.

Mr. Shaw has presented me with a written motion. I am not accepting any more pretrial motions.

MR. SHAW: Your Honor, I would like to speak on that.

THE COURT: It is too late for the motion.

MR. SHAW: Your Honor, it's not too late for motions. That motion was filed April 1st.

THE COURT: It is too late for any motions and I am not accepting it.

MR. SHAW: Your Honor, I would like to be heard. I would like to make a record.

As my papers indicate, on the 1st of April of this year a motion was submitted by me in behalf of Henry Cifuentes-Rojas. In my motion papers I specifically moved to suppress any and all evidence that the Government might try to introduce against my client on the grounds of an illegal search and

seizure.

At the same time and in the same papers I submitted to the Government a demand for a bill of particulars. In the demand for a bill of particulars, I asked for certain facts, and if the Court reads my papers, which I hope the Court did -- these papers, similar ones, have been utilized in other cases that I have tried in this court on similar issues, on the exact same issue -- my papers stated that when the Government supplied me with the particulars I would ... fully and broadly bear out in my papers what evidence we wished to suppress on behalf of Rojas that the Government intends to introduce.

Last Thursday the Government finally provided particulars. All the Government stated in its papers was that my client was in an apartment. It did not state what contraband was seized that I asked for in my bill of particulars, it did not state on what grounds the contraband that was allegedly seized should not be suppressed.

I was in contact with Your Honor's law clerk and made another motion to suppress after Mr. Carey and I had a discussion on the phone, and I said to Mr. Carey, "Don't you think it's a little late to respond to my bill of particulars at this time?"

"No comment, Mr. Shaw."

"Well, is it too late, Mr. Carey, to file

motions?"

"No, it's not too late, Mr. Shaw, as far as the Government is concerned."

I submitted another motion to suppress, actually a part of the first motion to suppress, again citing the fact that particulars had not been provided to counsel and again asking to suppress.

Yesterday your Honor received a more particularized motion. On Monday I stated to the Court that I asked that all the papers in the state case be made part of the federal case. Your Honor denied that motion.

So on Tuesday your Honor was provided with a specific motion to suppress, including my client's affidavit in the state court.

Now, this issue has been ruled on by Judge Coon. We stated this to your Honor the first time we appeared before your Honor back in April. I believe it was March. We stated that Judge Coon had made a decision and I relied upon that, and I stated that on the record. I still rely on Judge Coon's decision. I think it is the law of the case.

The memorandum of law that was submitted to the Court this morning and to Mr. Carey states --

THE COURT: It can't possibly be the law of the case.

MR. SHAW: This issue has been heard by a

a judge in the (a con-) current jurisdiction. He has had a 3-1/2 week hearing. He spent months deliberating. He heard the witnesses and he made the decision that this evidence should be suppressed. Now your Honor is stating that my client --

THE COURT: Mr. Shaw --

MR. SHAW: I am not finished, your Honor. I am trying to make a record.

THE COURT: Mr. Shaw --

MR SHAW: Your Honor, I think I am being curtailed.

THE COURT: You have made your record.

(Pre-trial hearing pages 465-468)

MR. SHAW: Your Honor, will I be permitted an opportunity to address the Court in regard to the timeliness of the motion to suppress?

THE COURT: No.

I am not going to hear that anymore. We have been through that.

MR. SHAW: Will your Honor permit me to submit you a memorandum of law on that subject? The cases are Legion.

THE COURT: No, I am not going to hear--

MR. SHAW: Permitting counsel --

THE COURT: Mr. Shaw, I have heard it, I

have decided it. You have your right. There is no point in going through anything again and again. It is on the record.

(Pre-trial hearing pages 565-566)

Defendant Rojas renewed his objection on the suppression issue during trial without success:

MP. SHAW: The motion I was talking about before of course is the motion to suppress that I originally made. I think you can see now from the evidence that has come in that the affidavit my client made and the allegations he made on the original motion is true.

The man was arrested on the street at 30th Street and I still can't understand why your Honor didn't let me have a hearing now we got Lieutenant O'Shea on the stand and there is more coming out and there was no warrant, Judge. That search couldn't possibly be under the law of search and seizure because the officer Palombo, his teacher would have told at the DEA school that the search warrant wasn't any good.

THE COURT: All right, it is a little late for that, Mr. Shaw.

(TT 2196-2197)

and again:

MR. SHAW: If your Honor please, with regard to the motion to suppress that I made and I renew my application and I understand that you deny it, stemming further from that particular application of mine, I have a right to view all the items that the government allegedly seized in an apartment. They haven't been shown to me.

(TT2274)

At the pre-trial conference on March 30, 1976, Hon. Judge Carter specifically stated that the defendants would not be restricted to the 10 day time limit to submit motions. The following dialogue is clear on this issue:

MR. CIAMPA: I have a motion to make. My name is John Ciampa and I represent the Rev. Mejias. I have a motion that is critical in this case.

As far as the ten day rule, I represented at the time of the arraignment and assignment that I was on trial and I would not be able to give myself to this case at all until I completed that particular trial. That case is also a ten week trial and the jury is out right now.

So, your Honor, I want to express the importance of this motion, becuase I represented Mejias in the State court where a motion to suppress was

granted by a State Supreme Court Justice, and I think this Court must either sua sponte or on a motion by me consider this suppression application.

THE COURT: I beg your pardon.

MR. CIAMPA: I think the Court must sua sponte or by motion from the defense consider this suppression problem.

THE COURT: I think you are in error. In any event, what I don't understand is that the rule is clear, the motions are supposed to be in in ten days. You should have gotten in touch with me, knowing that the case was assigned to me, and so forth.

However, since we are now at least a month and a half away from trial, I am not going to hold you to that. But I am going to indicate to all of you that if you have a criminal trial before me again, don't come in and tell me that you thought you had more time, because if you want to have any extension beyond ten days, you make that application before the ten days is up.

All right, Mr. Ciampa, you can sit down.

(Conference, March 30, 1976
Pages 16-17, emphasis added)

and again:

THE COURT: Sit down, Mr. Carey.

There is certain discovery that the government is required to give and before I have any motions on that subject, since I am going to give you time to make motions, what I think you ought to do and what I am insisting you do, is you have a conference. You can have that conference with Mr. Carey at the close of this hearing. You indicate to him what it is you want and get responses from him as to what it is he is willing to give you. What he refuses to give you, then you can make that a matter for a motion, but it appears to me that in this way you will save -- the government is going to be willing to give up many of the things you are going to file motions and papers about.

My disposition in regard to this is to insist that the government give over as much as it can, even if it is not required to, that is not going to interfere with its strategy in this case.

It seems to me there is nothing to be gained by holding back evidence that evidently you are going to give up. You make arrangements, those of you who are affected by it, you make arrangements with Mr. Carey to listen to the tapes, and I want all of this done by today. Thereafter, you may file your motions.

I want all motions -- all motions -- of whatever kind, to be filed by Wednesday of this week. All motions.

In regard to that, I want the government's

response filed to all motions by Monday.

MR. CIAMPA: You mean tomorrow, your Honor? Tomorrow is Wednesday.

THE COURT: I'm sorry. I thought it was Monday. I will give you until Thursday. You have your conference with Mr. Carey today and you file your motions with me on Thursday and I want the government's response to those motions by Monday.

(Pretrial Conference
March 30, 1976
Pages 19-20
Emphasis added)

The following colloquy indicates that the suppression motion of one defendant would also be applied for the benefit of other defendants:

MR. CHASE: Your Honor, I'm sorry. One last question on the matter of economy.

Would your Honor consider it sufficient if, for example, Mr. Ciampa files a motion for a hearing to suppress and I join in that motion?

THE COURT: That is sufficient.

MR. SOLOMON: Would your Honor make a ruling we are all permitted to join in it so one decision covers us all?

THE COURT: That is more or less true if the matter covers you, yes.

(March 30, 1976 Conference
Pages 29-30)

Furthermore, Defendants were informed on February 23rd that no definite time had been set for filing motions:

> Mr. CHASE: Lastly, your Honor, I would apologize to the Court. It was my understaning on February 23rd Judge Tenney specifically stated there would be no time set for motions and I apologize to the Court for being misled by that.
>
> I too would join Mr. Ciampa's application. I certainly intend to file for suppression, which was done in the State Court, and also I believe that a minimization and audibility on the wire-tapping will be necessary.
>
> (March 30, 1976 ccnference Page 18)

It is respectfully submitted that the pre-trial motion to suppress on behalf of Rojas was timely for any one of the following reasons:

1) The motion with an accompanying affidavit, request for discovery of bill of particulars was filed on April 1st, pursuant to the request of the Trial Judge (this motion was renewed by further written motions on May 14th and May 18th)
2) Co-defendants made timely motions which the Trial

Judge ruled would inure to the benefit of all defendants.

3) The motion was filed prior to trial, pursuant to Rule 12(b)(3) of the Federal Rules of Criminal Procedure.

Rojas contends herein that a grave injustice will occur if this Honorable Court upholds the denial of his motion to suppress on the ground of timeliness. Justice can only be served by ordering this case remanded so that a proper suppression hearing can be conducted.

C. THE DEFENDANT ROJAS HAD STANDING TO CHALLENGE THE SEARCH AND SEIZURE OF EVIDENCE AT THE 30TH STREET APARTMENT

Defendant, Rojas, made requests to be afforded a hearing which was denied on the ground of lack of standing. For example:

Who of the defendants joined in the motion to suppress the evidence seized?

MR. LIPSON: Defendant Padilla has joined in this motion.

MR. BROWN: Defendant Cedena has joined.

MR. LANDAU: Valenzuela has also joined in that motion.

THE COURT: Who is your client?

MR. SHAW: Rojas.

THE COURT: I don't see that -- as I understand it, at the time this evidence was seized, the people -- it was seized from what purports to be Rev. Mejias' apartment. Valenzuela and Padilla, I believe, were present. I don't know about Cedena. There is no evidence that anybody else was there.

(Pre-trial hearing
P. 20)

and again:

MR. CAREY: Your Honor, before we proceed, may I just make one comment on Mr. Shaw's motion.

I agree with your Honor and it is the Government's position that the defense motion by Mr. Shaw is untimely, but I would also request the Court find at this time for the record an appeal that the papers submitted by Mr. Shaw in support of his motion not only fail to establish that he has standing, but give every indication that he has no standing.

He claims that the Government contends that this apartment was his. I will not address myself to what the Government contends. In any event, the Government does not concede that it was his apartment.

Secondly, he claims that he was not an invitee to that apartment, that he was arrested outside the apartment, number one, and later was forcibly taken into it.

MR. SHAW: Judge, that is exactly what I am trying to get to. I move to dismiss the indictment, especially count 5, because I don't see how my client could be charged with possession if the Government is going to concede my client was outside.

How can I make a motion to suppress? The bill of particulars tells me that he is outside. The indictment says he is inside.

We are betwixt and between. Let the Government

make up their mind. I will withdraw my motion to suppress if count 5 is thrown out and also overt act No. 75.

Counsel and his client don't know what to do here. The Government says in the indictment and the grand jury says he is in possession. Then in the bill of particulars and in the papers supporting -- by Mr. Carey stating that he does not have to supply me with particulars, he clearly and unequivocally states my client was outside the apartment. Where do we stand?

That is what my brief says this morning. If we have standing we move to suppress. If we don't have standing, then we state is that going to be the Government's position at trial, that my client was outside and that he was forcibly brought up to this apartment? Because if it is, then the law of the State of New York and the law of the federal government and the federal courts are the same, that that evidence has to be suppressed.

A man in this day and age still can't be held to be accountable for contraband taken in an apartment when he is not in that apartment.

THE COURT: All right.

What I have indicated in this case stands. I am not considering the motion.

(Pre-trial hearing
Pages 469-471)

Continued attempts to inform the Court that the defendant, Rojas, should be able to participate in the suppression hearing were rebuffed. For example:

Q. What, if anything, did Trooper Bucci do at about that time?

A. About that time, as it rang, Detective Bucci rang the bell --

MR. SHAW: Objection.

THE COURT: Objection overruled.

MR. SHAW: He can't testify to anything he didn't see.

THE COURT: You don't have any basis to make any objection. You are not even in this part of the proceeding, Mr. Shaw.

MR. SHAW: That is not my understanding of how conspiracy cases are tried, your Honor.

THE COURT: We are not on trial. We are on a hearing. You have no basis to make any objection.

MR. SHAW: Your Honor, I respectfully except.

THE COURT: Proceed.

(Pre-trial hearing
Page 76)

and again:

MR. SHAW: Your Honor, I want to place on the record my objection to not being able to cross examine this witness.

THE COURT: Your objection is already noted. You don't have to make it every hour.

MR. SHAW: With all due respect to your Honor, there was mention of my client after the first time I objected and I again object on the grounds that my client has been brought up.

THE COURT: All right, fine.

(Pre-trial hearing
Page 800)

In United States v. Tortorello, 533 F2nd 809 (2nd Cir, 1976), this Honorable Court decided that the following factors were crucial in determining whether a defendant has met the standing requirement:

(a) whether the defendant was on the premises at the time of the contested search and seizure;
(b) whether the defendant alleged a proprietary or possessory interest in the premises; and,
(c) whether the defendant has been charged with an offense which includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure. Id, at 813.

It is contended herein that defendant Rojas had standing to challenge the evidence seized at the apartment at 327 West 30th Street. Rojas was charged in Court Five

of the Indictment with possession of 3-3/4 pounds of contraband. Overt Act Number 75 of Count One of the Indictment alleges that Rojas possessed 3-3/4 pounds contraband in the 30th Street Apartment.

Personal belongings owned by defendant Rojas were seized in the 30th Street Apartment.

> In order to qualify as a "person aggrieved by an unlawful search and seizure "one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else. Jones v. United States, 362 U.S. 257, 261 (1960)

Defendant Rojas was not even permitted a hearing in Court to litigate these extremely important constitutional issues, in spite of all the aforementioned factors that bestow on Rojas sufficient adversary interest in the outcome of the controversy required for standing. FLAST v. COHEN, 392 U.S. 83 (1968).

It is respectfully submitted that this grave defect in the proceedings below deprived appellant, Rojas, of his

rights under the due process clause of the United States Constitution, and can only be remedied by this Honorable Court ordering a remand for a suppression hearing in the District Court and a new trial. It should be noted that the prosecutor, in both his opening and closing statements, referred to the 30th Street apartment as Rojas' "stash pad".

POINT II

EVIDENCE INTRODUCED AGAINST APPELLANT ROJAS WAS SEIZED WITHOUT A WARRANT IN VIOLATION OF HIS RIGHTS UNDER THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION, NECESSITATING THE DISMISSAL OF COUNT FIVE, THE POSSESSION COUNT, AND/OR REQUIRING REMAND OF APPELLANTS CASE FOR AN EVIDENTIARY HEARING ON THE ISSUES.

The record of the trial below clearly reveals that law enforcement personnel acted expediently, and, without justification, when they broke into apartment 6A at 327 West 30th Street, New York, New York without a search or arrest warrant. There are no facts in the record to argue that an "emergency doctrine" exception to the Fourth Amendment warrant requirement existed. The 30th Street apartment was literally surrounded by law enforcement personnel. The only activity observed from the apartment was individuals walking out. In fact, two more individuals walked in and were arrested after the initial break in and they were subsequently released.

Apartment 6A at 327 West 30th Street was under surveillance by employees of the New York City Police Department and the D.E.A. since 7:30am on September 3, 1974 as part of a large investigation that involved both federal and state authorities (TT2578). Police Officer Mulligan, who was watching apartment 6A through a peephole in the door of apartment 6B merely observed individuals walking out of apartment 6A (TT2588, 2295).

Mulligan testified that he broke into and searched the

the apartment with two other New York City Police officers without a warrant (TT2215).

Police Officer Manning testified that he participated in the search of apartment 6A at 327 West 30th Street without a warrant by gaining entry through the door (TT2313, 2316, 2318) at the same time that other law enforcement personnel gained access to apartment 6A through the window (TT2338). Said two pronged illegal entry all but negates any possibility of a necessity for a "security" or "emergency" search.

In COLLIDGE vs. NEW HAMPSHIRE, 403 U.S. 443, 454-455 (1971) the Supreme Court reviewed the historical legal perspective that is germane to the instant case:

> Thus the most basic constitutional rule in this area is that "searches conducted outside the judicial process, without prior approval by judge or magistrate, as per se unreasonable under the Fourth Amendment - subject only to a few specifically established and well-delineated exceptions."[5] The exceptions are "jealously and carefully drawn,"[6] and there must be "a showing by those wo seek exemption . . . that the exigencies of the situation made that course imperative."[7] "[T]he burden is on those seeking the exemption to show the need for it."[8] In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the values that it represents may appear unrealistic or "extravagant" to some. But the values were those of the authors of our fundamental constitutional concepts. In times not altogether unlike our own they won - by legal and constitutional means in England,[9] and by revolution on this continent - a right of personal security against arbitrary instrusions by official power. If times

have changed, reducing everyman's scope to do as he pleases in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less, important.[10]

5. Katz v United States, 389 US 347, 357, 19 L Ed 2d 576, 585, 88 S Ct 507.
6. Jones v United States, 357 US 493, 499, 2 L Ed 2d 1514, 1519, 78 S Ct 1253.
7. McDonald v United States, 335 US 451, 456, 93 L Ed 153, 158, 69 S Ct 191.
8. United States v Jeffers, 342 US 48, 51 96 L Ed 59, 64, 72 S Ct 93.
9. See Entick v Carrington, 19 How St Tr 1029, 95 Eng Rep 807 (1765), and Wilkes v Wood, 19 How St Tr 1153, 98 Eng Rep 489 (1763).
10. See Elkins v United States, 364 US 206, 4 L Ed 2d 1669, 80 S Ct 1437.

The issue at hand was ruled on by a court of competant jurisdiction in PEOPLE v SALAZAR, 83 M 2d 922, 373 NYS 2d 295 (New York County, 1975). SALAZAR, Supra decided the issue of suppression in regard to the same defendants, and the same evidence as the instant case. In that case, Honorable Justice Liston F. Coon of the New York State Supreme Court, sitting in a narcotics part, where only marcotics cases and issues arising thereunder are heard, including issues arising out of many joint Federal and State task force arrests for narcotics in the Southern District of New York (Bronx and New York Counties), ruled that all the evidence in the 30th Street and 48th Street apartments must be suppressed. Justice Coon, after more than three and one half weeks of a suppression hearing

and after considering federal cases, ruled in the State case that "Exigent circumstances simply did not exist". Id at 927, 301.

Justice Coon found,

> "that the mere possibility existed in the minds of the police that the arrest might be observed by someone in a position to give warning and that warnings might be given, did not create an exigent circumstance justifying the intrusion". Id, at 929, 303 (emphasis supplied).

Justice Coon citied and relied in part on UNITED STATES v. RUBIN, 474 F 2d 262 (3rd Cir., 1973). In Rubin, Judge Rosenn discussed the factors that must be considered in order to determine whether a warrantless search for narcotics could be held operable within the confines of the Federal Court of Law.

> When Government agents, however, have probable cause to believe contraband is present and, in addition, based on the surrounding circumstances or the information at hand, they reasonably conclude that the evidence will be destroyed or removed before they can secure a search warrant, a warrantless search is justified. The emergency circumstances will vary from case to case, and the inherent necessities of the situation at the time must be scrutinized. Circumstances which have seemed relevant to courts include (1) the degree of urgency involved and the amount of time necessary to obtain a warrant, compare United States v. Pino, 431 F.2d 1043, 1045 (2d Cir. 1970), with Niro v United States, 388 F.2d 535 (1st

> Cir. 1968); (2) reasonable belief that the contraband is about to be removed, United States v. Davis 461 F.2d 1026, 1029-1030 (3r Cir. 1972); Hailes v. United States, 267 A.2d 363 (D.C.C.A. 1970); (3) the possibility of danger to police officers guarding the site of the contraband while a search warrant is sought, United States v. Pino, 431 F.2d at 1045; (4) information indicating the possessors of the contraband are aware that the police are on their trial, United States v. Doyl, 456 F.2d 1246 (5th Cir. 1972); and (5) the ready destructibility of the contraband and the knowledge "that efforts to dispose of narcotics and to escape are characteristic behavior of persons engaged in the narcotics traffic," United States v. Manning, 448 F.2d 992, 998-999 (2d Cir. 1971); United States v. Davis, 461 F. 2d at 1031. Id, at 268-269.

In United States v. Chadwick, 532 F 2d 773 (1st Cir., 1976) (U.S. Appeal Pending) a warrantless search of a footlocker and suitcases was conducted in spite of the fact that probable cause existed and there was ample time to obtain a warrant. The contraband which was discovered was suppressed. The Chadwick court relied on the doctrine that:

> searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment - subject only to a few specifically established and well-delineated exceptions. KATZ v. UNITED STATES, 389 U.S. 347, 357 (1967), quoted in COOLIDGE v. NEW HAMPSHIRE, 403 U.S. 443, 454-55 (1971); UNITED STATES v. WATSON, 423 U.S. 411, 425 (1976) (Powell, J., concurring).

In the case at bar, the Government failed to sustain

their burden of demonstrating the need for a warrantless search of the 30th Street apartment. The United States Supreme Court held in UNITED STATES v. JEFFERS, 342 U.S. 48, 51 (1951) that,

> Over and again this Court has emphasized that the mandate of the Amendment requires adherence to judicial processes. See Weeks v. United States, 232 US 383, 58 L ed 652, 34 S Ct 341, LRA1915B 834, Ann Cas 1915C 1177 (1914); Agnello v. United States, 269 US 20 70 L ed 145, 46 S Ct 4, 51 ALR 409 (1925). Only where incident to a valid arrest, United v. Rabinowitz, 339 US 56, 94 L ed 653, 70 S Ct 430 (1950) or in "exceptional circumstances," Johnson v. United States, 333 US 10, 92 L ed 436, 68 S Ct 367 (1948) may an exemption lie and then the burden is on those seeking the exemption to show the need for it, McDonald v. United States, 335 US 451, 456, 93 L ed 153, 158, 69 S Ct 191 (1948). In so doing the Amendment does not place an unduly oppressive weight on law enforcement officers but merely interposes an orderly procedure under the aegis of judicial impartiality that is necessary to attain the beneficient purposes intended. (Emphasis added)

In United States v. Roselli 506 F 2d 627, 629 (7th Cir., 1974), (entry into apartment without a warrant held not justified) Supreme Court Justice Stevens while sitting on the 7th Circuit Court reiterated the Supreme Court's decision in Jeffers, Supra, "the burden of justifying a warrantless, forcible entry into a private home is, of course, upon the government."

In the instant case, the prosecution never met their burden. This is in part because of the fact that the defendant's

bill of particulars and motion were not timely responded to and "because no hearing was held as discussed in Point I of this brief."

Appellant also relies on United States v. Hayes, 51 F 2d 675 (6th Cir, 1975) which contains facts analagous to the case at bar. In Hayes, a warrantless entry was held to be a violation of the defendent's Fourth Amendment right and their convictions were reversed and remanded. The Hayes court held:

> Since the agents had already arrested all persons whom they had reason to believe were involved in the drug scheme, and since they have not shown that it was unreasonable to expect that they could have guarded the door while they sought a judicial officer and a search warrant, we cannot find an exigent circumstance in this case which justifies the warrantless entries by the agents. Id, at 678

Appellant reiterates his argument based on his Fourth Amendment rights and the facts of the instant case and prays that this honorable court dismiss the indictment against him or order a new trial and hearing on the issues.

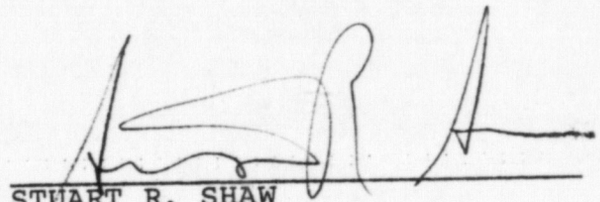
POINT III

In an effort to avoid duplicative work in this multiple appellant case, defendant Rojas respectfully requests this Honorable Court to adopt by reference all applicable points in the briefs of the co-appellants, pursuant to Rule 28 (i) of the Federal Rules of Appellate Procedure.

CONCLUSION

THE JUDGEMENT OF CONVICTION OF THE TRIAL COURT SHOULD BE REVERSED AND THE INDICTMENT DISMISSED OR, IN THE ALTERNATIVE, THIS COURT SHOULD ORDER A REMAND FOR A SUPPRESSION HEARING ON BEHALF OF DEFENDANT, ROJAS.

Respectfully submitted



STUART R. SHAW
600 Madison Avenue
New York, New York 10022
Attorney for Henry Cifuentes Rojas

COPY RECEIVED
NOV 1 1 1976
ROBERT B. FISKE JR.
SO. DIST. OF N.Y.